



COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

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IN REPLY PLEASE
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April 21, 2011

TO: Each Supervisor
FROM: Gail Farber *Gail Farber*
Director of Public Works

**BOARD MEETING OF APRIL 26, 2011, AGENDA ITEM 23
BRIDGE SEISMIC RETROFIT
QUEENSWAY SOUTHBOUND RAMPS J & K OVER HARBOR SCENIC DRIVE**

On March 8, 2011, Agenda Item 29, your Board requested that Public Works and County Counsel schedule a hearing to review Public Works' recommendation to terminate A.M. Classic Construction, Inc.'s, right to perform for cause.

Subsequently, a Hearing Officer was assigned to review material that was provided by Public Works and A.M. Classic, Inc., in advance of a formal hearing. This material, exchanged in a series of transmittals between the parties starting on March 24, 2011, was used at an April 8, 2011, hearing. The Hearing Officer, per your Board's direction and with the guidance of County Counsel, was tasked with investigating the question of whether a termination for cause recommendation being made by Public Works was reasonable.

The Hearing Officer issued the attached report, and it concludes that while Public Works had a reasonable basis for recommending termination for default, Public Works may have contributed to the delay in completing the work. Therefore, the report recommends the contract be terminated for convenience.

Each Supervisor
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In order to allow for careful consideration of the Hearing Officer's report, we respectfully request that the subject item be referred back to Public Works. We will continue to seek the best course of action in getting this project completed as expeditiously as possible.

JFG:ss

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Attach.

cc: Auditor-Controller (Michael W. Clark)
Chief Executive Office (William T Fujioka)
County Counsel
Executive Office

**LOS ANGELES COUNTY DEPARTMENT OF PUBLIC WORKS
PROJECT ID. NO. RDC0012103
BRIDGE SEISMIC RETROFIT
QUEENSWAY SOUTHBOUND RAMPS J & K OVER HARBOR SCENIC DRIVE**

**HEARING ON DEFAULT OF:
A.M. CLASSIC CONSTRUCTION, INC.**

REPORT OF HEARING OFFICER

Hearing Date: April 8, 2011

Hearing Officer:

**David P. Howard, P.E.
Assistant Deputy Director
Department of Public Works**

Introduction

In response to comments expressed by members of the Board of Supervisors during their March 8, 2011 meeting, the Department of Public Works (Public Works) convened a hearing to review Public Works' recommendation to terminate A.M. Classic Construction, Inc.'s (AM Classic), right to perform under the subject contract with the County of Los Angeles (County) for cause. This hearing took place on April 8, 2011, at Public Works Headquarters in Alhambra, California.

The Hearing Officer was Mr. David Howard, Assistant Deputy Director of Public Works. Mr. Larry Hafetz, Principal Deputy County Counsel provided legal advice to the Hearing Officer. AM Classic was represented by Mr. Asghar Madhavi and Mr. Michael Cornelius. Public Works was represented by: Mr. Bill Winter, Mr. Jim Sparks, Mr. Ken Swanson, Mr. Laren Bunker, and Ms. Jolene Guerrero, and Ms. Rosa Linda Cruz from County Counsel. In addition, representatives of AM Classic's surety company, Arch Insurance Company, were present, as was Ms. Madhavi's wife, and a court reporter.

An audio recording was taken in addition to a transcript prepared by the court reporter. Therefore, this report will not attempt to summarize the more than 4 hours of presentations made during the hearing, nor the extensive amount of documentation submitted to the hearing officer.

Purpose of the Hearing

The purpose of the hearing was as follows: 1) to determine whether the recommendation for termination for default is proper, and 2) not to resolve any specific disputes or address compensation.

Issues

- 1) The Contract in Section 12, provides conditions under which the County "may terminate the Contractor's right to proceed with the work," and Conditions (ii), (iii), and (iv) were cited by Public Works in their March 24, 2011, letter to AM Classic as the basis of the recommendation to terminate. Conditions (ii) and (iii) involve timely prosecution and completion of the work, and Condition (iv) involves timely payment of subcontractors and employees.

From the testimony provided, as well as the written documentation provided, there is no dispute that AM Classic discontinued work on the site on or about November 19, 2010, and did not resume work when directed to do so in Public Works' notice dated December 7, 2010.

There is some disagreement regarding whether or not AM Classic intends to complete the project work. According to Public Works' testimony, AM Classic requested to be terminated for convenience rather than terminated for default. During the hearing, AM Classic stated a desire to complete the work conditioned on the work being supervised by an agency other than Public Works, or to be terminated for convenience.

To date AM Classic has not resumed work on the site. From the evidence submitted, it was clear that based on the amount of work which AM Classic had completed prior to discontinuing work on November 19, 2010, there would have been insufficient time remaining within the contract duration to complete the balance of the work.

There is also documentation of outstanding stop notices, indicating that subcontractors and/or material suppliers had not received payment. The stop notices that were provided as evidence at the hearing are an important indication that the project was not progressing well, and they demonstrated a failure by AM Classic to make timely payments to subcontractors. The combined dollar amount of the stop notices is significant given that this was a relatively small contract, and that the stop notices represented a large percentage of the amount of the subcontracts.

These facts appear to provide sufficient grounds for the County to exercise its contractual right to terminate the contract for default.

- 2) The Contract in Section 12, goes on to say "the Contractor's right to proceed will not be terminated because of delays, nor will the Contractor be charged with damages under the subsection, if: a) the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor (examples of such causes include: (iii) acts of the Agency in either its public or contractual capacity)"

AM Classic presented numerous and lengthy explanations for the delays and problems that were encountered in completing the work. Without making a judgment on the validity of the explanations, the explanations can be distilled down to the premise that AM Classic's failure to complete the work within the allotted time, and to make timely payments was caused either in total or in a large degree by the County, and that the County did not make fair or timely adjustments to the contract to compensate for these factors.

Public Works likewise presented many detailed explanations to support its position that the delays on the project were primarily the responsibility of AM Classic, and

that Public Works had granted time extensions to AM Classic where it was appropriate to do so. Public Works further submitted documentary evidence which was asserted to show that AM Classic had been paid on a timely basis. Public Works further stated that they had attempted to assist AM Classic by advancing money for materials that were delivered to the site but had not been installed.

While the hearing was not intended to "resolve specific disputes, or address compensation," the validity of AM Classic's position hinges on this point. If AM Classic's allegations were to be found to be correct, or correct to a large extent, then the contractual basis for Termination for Default comes into question.

3) Both parties provided an extensive amount of documents and oral testimony to support their stated perspectives of the progression of the project, and the various issues that impacted its completion. From the evidence provided, it is clear that many separate and distinct issues combined to affect the timely and successful completion of the work. Without attempting to adjudicate these issues, a number of observations can be made:

- AM Classic struggled to complete the work within the allotted time. This in turn resulted in cash flow problems for them, and the lack of available cash flow lead in full or in part to their decision to discontinue work at the site.
- There were many factors that apparently contributed to the delay in prosecuting the work. Each side presented extensive documentation of their perspective of the causes of delay. No clear comprehensive schedule analysis was presented by either side that would confirm which delays were truly compensable or noncompensable. This analysis will ultimately need to be done in order to resolve any remaining requests for additional compensation from AM Classic.
- One of the significant factors that affected the schedule appears to have been a delay resulting from the need to obtain approval from the Port of Long Beach of a revised traffic control plan for the project. There is significant disagreement between the parties about which side is responsible for this delay, and whether fair adjustment of the project schedule was given. Change Order No. 1 does assign the responsibility to obtain this approval to AM Classic. However, actions by Public Works following the approval of Change Order No. 1 appear to contradict the perspective that Public Works believed that AM Classic had this responsibility, or at least, had the sole responsibility for this task and its resulting delay.

- Another significant point of disagreement between the parties was the cause, and the responsibility for settlement of the soil beneath the existing roadway during the pile driving operation. Multiple theories about the cause of the settlement were presented, and this matter is still not resolved. It is clear from the evidence that AM Classic placed a surcharge load on the soil adjacent to the shoring, that it designed and installed, as a result of using a piece of equipment that was larger than anticipated in the design. Also, it was argued that the use of a vibratory hammer to install the piles may have caused the settlement of the soil. The vibratory hammer was used at the request of AM Classic as an alternative to an impact hammer with the consent of Public Works. The record shows that one of Public Works' geotechnical engineers recommended vibrating the piles rather than driving them. Furthermore, the record shows that the existing soil is hydraulically placed fill, which is susceptible to consolidation.
- It was clear from the evidence that the working relationship between the parties deteriorated over the life of the project. Without assessing the responsibility for this, communications were so badly strained that AM Classic began to make video and/or audio recordings of project meetings and events. This did not contribute to the timely and cooperative resolution of issues, including requests for change orders and time extensions.

Findings

- 1 There are remaining disagreements between AM Classic and Public Works regarding AM Classic's requests for adjustments of cost and schedule in their contract. These issues will require a concerted effort by both parties to resolve separate and apart from the issue of this hearing. Some sort of process for escalating disputed issues on the project could have been helpful in bringing more timely resolution of issues and possibly have lead to a more successful outcome.
- 2 AM Classic took an extremely unusual step by discontinuing work on this project in the middle of construction. This work impacts a very important bridge serving the Port of Long Beach; forcing Public Works to take extra measures to stabilize the bridge footings after AM Classic abandoned the site. Discontinuing work is clearly a contractual basis for termination for default.

3. Public Works was not without error in its administration of the contract. However, the owner is not required to act perfectly in order to exercise the default provision of the contract.
4. The allegations made by AM Classic of egregious misconduct by Public Works staff were not demonstrated in the hearing. The accusatory and antagonistic approach by AM Classic's consultant Mr. Cornelius was beyond what is normal in the industry. This likely contributed to the difficulty in resolving disagreements on the project.
5. AM Classic requested prior to the hearing and repeated again during the hearing that the contract either be terminated for the convenience of the County or that AM Classic be allowed to complete the work under the direction of another agency, such as Caltrans, rather than having the contract terminated for default.

Conclusion

It is my conclusion that the decision of AM Classic to discontinue work on the site provides Public Works with a reasonable basis for its recommendation to the Board of Supervisors to terminate this contract for default. However, I have further concluded that there remain questions about the extent to which the acts of the agency may have contributed to the delay in completing the work, and whether appropriate compensation has been given for various changed conditions. Therefore, it is my recommendation that the contract be terminated for the convenience of the County.

Respectfully Submitted,



DAVID P. HOWARD
Assistant Deputy Director
Department of Public Works

Date: April 21, 2011